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No. 88-7194

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ARTHUR LAJUANE TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITIONER'S REPLY TO SOLICITOR GENERAL'S BRIEF IN OPPOSITION

Based on an overly narrow framing of the issue, the Solicitor General opposed Arthur Lajuane Taylor's petition for a writ of certiorari and recommended Carter v. United States, petition for cert. filed, No. 88-7307 (U.S. May 22, 1989), as the "appropriate vehicle" for resolving the conflict in the circuits over the meaning of the word "burglary" in the definition of "violent felony" in 18 U.S.C. § 924(e)(2)(B).[1] Brief for the United States in Opposition at 16 & n.15, Taylor v. United States, petition for cert. filed, No. 88-7194 (U.S. May 10, 1989)(hereinafter "Opposition Brief"). The Solicitor General alleges that the issue dividing the circuits is whether "burglary" under

[1]The pertinent statutory provision provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that -
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) Is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

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section 924(e)(2)(B)(ii) is limited to its common law definition. Opposition Brief at 5, 12, & n.15. The issue, however, is not whether "burglary" has any one particular definition as used in section 924(e). The issue is which definition of "burglary" is correct, if any, of the varying definitions ascribed to the word by the circuits interpreting the definition of "violent felony." See Petition for Certiorari at 11-15, Taylor v. United States, petition for cert. filed, No. 88-7194 (U.S. May 10, 1989) (hereinafter "Petition"); Opposition Brief at 11-16 & n.13; United States v. Patterson, No. 88-1497, slip op. at 19-20 (1st Cir. Aug. 23, 1989) ("burglary" not given "broad generic definition" from predecessor statute [as advocated by the Solicitor General], nor "its common law definition").

Notwithstanding the Solicitor General's more narrow characterization of the issue, petitioner has consistently raised the issue that has divided the circuits: whether "burglary" (under various state law definitions) is a "violent felony" under 18 U.S.C. § 924(e)(2)(B). Opposition Brief at 2, 3, 4 (citing petitioner's conduct in the district court, court of appeals and this Court). See Petition Appendix at 13a-14a; Pet. C.A. Br. at 7-13; Pet. C.A. Reply Br. at 1-10; Petition at 5, 9, 10-15. The government correctly states petitioner's position that his burglaries did not involve actual or potential injury to others and therefore are not "violent felonies" within the meaning of the statute. Opposition Brief at 4 & n.5, 11, 15. As the Solicitor General so aptly noted in his formulation of the "question presented" in this case, the issue is whether the offense of second degree burglary under Missouri law is a "violent felony" under the sentence enhancement provision of 18 U.S.C. § 924(e)(2)(B). See also Petition at ii (asserting in the question presented two other reasons, in addition to the common

law definition presumption, for why petitioner's burglary convictions were not "violent felon[ies]").

The Solicitor General's unduly narrow framing of the issue would address only whether "burglary" as used in section 924(e)(2)(B)(ii) is limited to its common law meaning. Accordingly, the government recommends granting certiorari in Carter, a case with a very limited record and holding and no appellate opinion, while it opposes certiorari in this case. Accepting the Solicitor General's recommendation would be a mistake.

The issue as framed by the Solicitor General in Carter would offer little guidance to the lower courts if it were addressed by this Court and would fail to resolve satisfactorily the broader, more important issue that divides the circuits, the question of which burglary convictions are "violent felon[ies]". If the Fourth and Ninth Circuits have erroneously concluded that "burglary" within the meaning of section 924(e) is restricted to its common law definition, as the Solicitor General contends, little will be gained by granting certiorari in Carter: all that would could be resolved would be that "burglary," as it is used in section 924(e), would not be restricted to "common law" burglary. This Court would still be deluged with cases raising the broader issue of what crimes labeled "burglary", if any, are not "violent felon[ies]" within the meaning of section 924(e). The issue raised by the Solicitor General is subsumed within the broader issue raised by petitioner herein and previously before the Court of Appeals.

This Court should grant a writ of certiorari in the case at bar because petitioner's case would provide the opportunity to offer more guidance and to resolve more completely the conflicts among the circuits. This Court can still determine whether common law "burglary" is the definition of burglary that Congress intended when it drafted section 924(e)(2)(B), the statute (the

issue which the Solicitor General contends would more appropriately be resolved by granting the petition in Carter). But in addition, this case offers much more in the way of guidance to the lower courts.

If certiorari were granted in Taylor, this Court could also address first, whether a definition under federal law was intended by Congress, and second, whether the courts could look beyond the fact of a conviction to the conduct itself, as opposed to determining whether a crime is "inherently violent" based only upon its elements. See United States v. Sherbondy, 865 F.2d 996, 1004-1010 (9th Cir. 1988).

Third, this Court could also determine whether seemingly nonviolent, unarmed burglaries of unoccupied structures could possibly fall into the catch-all provision of § 924(e)(2)(B)(ii) as "conduct that presents a serious potential risk of physical injury to another." See United States v. Patterson, No. 88-1497 (1st Cir. Aug. 23, 1989), slip op. at 17-30 (refusing to apply either the restrictive common law definition [accepted by the Fourth and Ninth Circuits] or the broad definition found in the repealed predecessor statute [as advocated by the government and accepted by the Third, Sixth[2], Seventh and Eleventh Circuits]).

Fourth, this Court could determine whether reference to the prior statutory definition of burglary, 18 U.S.C. (Appendix) § 1202(C)(9)(repealed), since deleted by Congress during its revision of the statute, is proper. See United States v. Hill, 863 F.2d 1575, 1581-82 (11th Cir. 1989). Fifth, in this case the Court could evaluate a burglary which is more clearly

[2]In a recent decision the Sixth Circuit joined the Third, Seventh and Eleventh Circuits in applying the former definition of burglary from the repealed, predecessor statute. United States v. William Henry Taylor, No. 88-6224 (6th Cir. Aug. 9, 1989).

"non-violent" than the burglaries in Carter, which apparently were burglaries of occupied structures. See Brief for the United States at nn. 1 & 3, Carter v. United States, No. 88-7307, petition for cert. filed (U.S. May 22, 1989). Cf. Mo. Rev. Stat. § 569.170 (1986) (discussed immediately, infra).

The Missouri statute, reprinted in Petitioner's appendix at 26a, is particularly suited for review because it was drafted with the obvious intent of delineating between burglaries which were potentially violent and those which were not. Compare Mo. Rev. Stat. § 569.160 (1986) (first degree burglary requires (1) possession of explosives or deadly weapon, or (2) causing or threatening physical injury, or (3) entry into an occupied structure) with Mo. Rev. Stat § 569.170 (1986) (second degree burglary necessarily involves unarmed burglary of unoccupied structures). Given this definition, second degree burglary under Missouri law cannot be a "violent felony" under § 924(e), because one cannot threaten potential physical injury to another without committing burglary in the first degree under Missouri law.

In summary, without further arguing the merits petitioner contends that his case offers more opportunities for this Court to provide guidance and to resolve more completely the conflicts in the circuits. The Solicitor General inaccurately contends that petitioner failed to raise below the issue of whether common law burglary is the proper definition of "burglary" as used in 18 U.S.C. § 924(e)(2)(B), because that issue is subsumed within the issue raised by petitioner. Indeed, the Solicitor General admits that petitioner discussed the common law burglary issue, as well as United States v. Headspeth, 852 F.2d 753 (4th Cir. 1988), although petitioner did not adopt that most restrictive reading of the word burglary. Opposition Brief at 15-16 & n.14.

By accepting review of the broader, more encompassing issue offered by petitioner's case, this Court can resolve more of the

questions that have been and will be brought before it. In contrast, if this Court accepts certiorari in Carter v. United States, No. 88-7307, as the Solicitor General has requested, Opposition Brief at n.15, it will have addressed only whether the proper definition of "burglary" in 18 U.S.C. § 924(e)(2)(B)(ii) is its most restrictive definition, common law burglary. Resolution of that issue will not stem the tide of cases being brought before this court: those that raise the issue of whether lesser degrees of burglary under various state laws are "violent felon[ies]" within the meaning of the statute.

CONCLUSION

Accordingly, this Court should grant certiorari in this case.

Respectfully submitted.

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